

Exhibit “A”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ALLSTATE INSURANCE	:	11-CV-2391(JG)
COMPANY, ET AL.,	:	
	:	
Plaintiffs,	:	
	:	United States Courthouse
-against-	:	Brooklyn, New York
	:	
	:	
	:	Thursday, February 16, 2012
KHAIMOV, ET AL.,	:	10:30 a.m.
	:	
Defendants.	:	
	:	
- - - - -	X	

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE

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A P P E A R A N C E S: (Continued.)

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Oral Argument

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1 (In open court.)

2 COURTRROOM DEPUTY: All rise. The United States
3 District Court for the Eastern District of New York is now
4 in session. The Honorable John Gleeson is now presiding.

5 (Honorable John Gleeson takes the bench.)

6 COURTRROOM DEPUTY: Calling civil cause for oral
7 argument in Docket No. 11-CV-2391, *Allstate Insurance*
8 *Company, et al. against Khaimov, et al.*

9 Counsel, please note your appearances for the
10 record.

11 THE COURT: Hello.

12 MR. VALERIO: Good morning.

13 MS. BURGOS: Good morning.

14 THE COURT: State your appearances, please.

15 MS. BURGOS: Your Honor for the plaintiffs, Sandra
16 Burgos along with Robert Stern and William Natbony.

17 MR. VALERIO: For the moving defendants, Amner
18 Khaimov, Zoya Aminova, Murdakhay Khaimov, Albert Khaimov,
19 Ilya Tamayeff, for Laperla Supply, Parsons Medical Supply,
20 Jamaica Medical Supply Queens Medical Supply, Grand Medical
21 Supply, Utopia Equipment and New Capital Supply, Max
22 Valerio, Tsirelman & Valerio, P.C., and I will be joined
23 this morning by Mr. Tsirelman.

24 MR. TSIRELMAN: Good morning, your Honor, same
25 defendants.

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1 THE COURT: Okay. Good morning.

2 MS. DIGLIO: Maria Diglio for defendants Yakov
3 Aminov, GNK Medical Supply and High Lawn Medical Supply and
4 I am joined by Edward Blodnick a partner in my firm.

5 THE COURT: Good morning. Is Royal Medical Supply
6 among the moving parties?

7 MR. NATBONY: I think so.

8 THE COURT: They're not listed, but I was
9 wondering why not.

10 MR. NATBONY: They're not listed, your Honor.

11 THE COURT: But that's your client?

12 MR. TSIRELMAN: Yes, your Honor.

13 THE COURT: You're moving on its behalf as well?

14 MR. TSIRELMAN: Yes.

15 THE COURT: Any objection to allowing them to join
16 this motion?

17 MR. STERN: No, your Honor.

18 THE COURT: Okay. Who wants to be heard first.

19 MR. BLODNICK: Your Honor, we thought we would be
20 heard on the arbitration issue first because a different
21 lawyer is arguing that, and then we would be heard on the
22 rest of it.

23 THE COURT: Okay.

24 MR. BLODNICK: Your Honor, my argument is going to
25 be very brief. The Supreme Court ruled in *AccuCredit* that

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1 an arbitration clause is enforceable unless the statute
2 specifically says there can be no arbitration. The language
3 contained in every no-fault policy is either this language
4 or similar language. In the event any person making a claim
5 for first-party benefits --

6 THE COURT: Slow down a little bit because he's
7 still taking it down.

8 MR. BLODNICK: Okay.

9 THE COURT: Sorry to interrupt.

10 Go ahead.

11 MR. BLODNICK: And the company do not agree
12 regarding any matter relating to the claim, and I emphasize
13 any matter relating to the claim, such person shall have the
14 option of submitting such disagreement to arbitration
15 pursuant to procedures promulgated or approved by the
16 Superintendent of Insurance. In *CompuCredit*, the Court made
17 the following rulings.

18 Starting with the background law covering the
19 issue before us is the Federal Arbitration Act enacted in
20 1925 as a response to judicial hostility to arbitration.
21 This provision establishes a liberal federal policy favoring
22 arbitration agreements. It requires courts to enforce
23 agreements to arbitrate according to their terms. And then
24 it refers to the specific language in the case before them
25 which contains the following language.

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1 *"You have a right to sue a credit repair*
2 *organization that violates the Credit Repair*
3 *Organization Act. Any waiver by any consumer of*
4 *any protection provided by, or any right of the*
5 *consumer under this subchapter shall be treated as*
6 *void and may not be enforced by any federal or*
7 *state court or any other person."*

8 The Court went on to say:

9 *"The only consumer right it creates is the*
10 *right to receive the statement which is meant to*
11 *describe the consumer protection that the law*
12 *elsewhere provides."*

13 Interpreting the right to sue language in
14 §1679 (c)(a), to create a right to sue in court not only
15 renders it strikingly out of place in the section that is
16 otherwise devoted to giving the consumer notice of the
17 rights created elsewhere, it also renders the creation of
18 the right to sue elsewhere superfluous.

19 The Court then goes on to say in *McMahon*, "We
20 enforced an arbitration agreement with respect to a cause of
21 action created by a provision of the Racketeer Influenced
22 Corrupt Organizations Act," which read in part.

23 *"Any person injured in his business or*
24 *property by reason of a violation of Section 1962*
25 *of this chapter may sue, therefore, in any*

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1 *appropriate United States District Court to shall*
2 *recover three-fold damages he sustained to the*
3 *cost of the suit."*

4 Thus, we have repeatedly recognized the
5 contractually required arbitration claims satisfies the
6 statutory prescription of civil liability in court.

7 And then the Court goes on to describe the
8 language as necessary to provide that there can't be
9 arbitration. It has done so with the clarity that far
10 exceeds the claimed indications in CLRA.

11 *"No predispute arbitration agreement shall be*
12 *valid or enforceable if the agreement requires*
13 *arbitration of a dispute arising under this*
14 *section."*

15 There is no such language in our case.

16 *"Only if after such controversy arises, all*
17 *parties to such controversy consent in writing to*
18 *the use of arbitration to settle such*
19 *controversy."*

20 There is no such language in this case.

21 If your Honor finds that the claims here
22 relate in anyway to the first-party benefits we as assignees
23 of the first-party benefits have a right to arbitration.

24 Thank you, your Honor.

25 THE COURT: Thank you.

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1 I want to hear all the defense arguments on
2 all of the -- with respect to all aspects of the motion and
3 then I'll hear from the plaintiff.

4 MR. BLODNICK: Your Honor, may I sit down?

5 THE COURT: Of course you may.

6 MR. BLODNICK: Thank you.

7 THE COURT: Thank you, sir.

8 MR. VALERIO: Just to clarify on the arbitration
9 issue, your Honor.

10 Plaintiffs argue that Section 409 of the
11 Insurance Law directs them to initiate civil suits. Now,
12 Section 409 sets forth a framework whereby insurance
13 companies must have a plan to submit to the Superintendent,
14 and this plan must detail how they intend to combat fraud,
15 insurance fraud.

16 As part of this claim, Section C describes
17 some of the activities that they can carry out. One of
18 these activities is initiation of civil actions. What we
19 are saying doesn't contradict or impair insurers' rights in
20 anyway. They have the right to initiate civil actions.

21 Incidentally, they also have an obligation to
22 inform law enforcement agencies. The reason is when there
23 are criminal violations it's not the insurance company's
24 duties to prosecute them it's obviously law enforcement
25 agencies, and they also have an obligation under the

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1 Insurance Law to notify administrative agencies of any
2 pattern of overcharging or overbilling or fraudulent
3 billing, which they haven't pled in their complaint which
4 happened in this case. But regardless, they have the right
5 to do it. They can commence whatever civil proceeding they
6 want, but that provision, which was enacted long after the
7 mandatory endorsement was promulgated. That provision
8 doesn't say: And by the way if you, insurer, commence a
9 civil action you have thereby eliminated the claimant's
10 right to arbitration.

11 So the two are perfectly reconcilable. If
12 they commence actions they can pick whatever venue they
13 want, but this doesn't eliminate claimant's rights to
14 arbitration and that right is what we're trying to enforce
15 here today.

16 I'm done with the arbitration portion.

17 THE COURT: Okay.

18 MR. VALERIO: If you -- whatever the Court wishes,
19 we can take the other arguments.

20 THE COURT: Whatever other arguments you wish to
21 make in support of the motions.

22 MS. DIGLIO: My arguments have to do with the RICO
23 motion.

24 THE COURT: Understood.

25 MS. DIGLIO: So on the part of our clients we've

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1 moved to dismiss the civil RICO cause of action against
2 Yakov Aminov. There is no RICO action against the two
3 companies, GNK and High Lawn.

4 Really, the crux of my motion is that
5 Allstate has failed to plead a distinct enterprise and let
6 me go through it a little bit.

7 Section 1961(4) defines an enterprise to
8 include an individual, partnership, corporation,
9 association, or other legal entity, et cetera, et cetera,
10 group of individuals associated in fact although not a legal
11 entity.

12 The Supreme Court in *Turkette* elaborates a
13 little bit. Explains that the enterprise must exist
14 separate and apart from the pattern of activity in which it
15 engages. It also says it must be an ongoing -- an
16 organization distinct from the conduct of the culpable
17 defendants.

18 And finally, it says, "The enterprise is not
19 the pattern of racketeering activity; that it's an entity
20 separate and apart from the pattern of activity which it
21 engages." That's *Turkette*, that's still good law.

22 So what's the enterprise here?

23 THE COURT: You don't want me to overrule the
24 Supreme Court?

25 MS. DIGLIO: I don't want them to say it's not

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1 good law any more. As far as our research, it's still good
2 law.

3 THE COURT: Doesn't it only have relevance to
4 association-in-fact enterprises?

5 MS. DIGLIO: I don't believe so. It just talks
6 about the enterprise. I mean, the language of *Turkette*
7 says, "The enterprise."

8 THE COURT: But in that case it was an
9 association-in-fact that was a bunch of drug-dealing
10 obstructing-of-justice criminals; right?

11 MS. DIGLIO: Yes. But the language --

12 THE COURT: The problem was whether they -- the
13 enterprise element and the pattern element will coalesce
14 because there was no structure. It was just a bunch of bad
15 guys committing crimes, and the Supreme Court said, "No, no,
16 you have to prove structure separate and apart from the
17 pattern." The proof may coalesce, but there are separate
18 elements. But here we don't have an association-in-fact
19 enterprise.

20 MS. DIGLIO: Completely understood, your Honor.

21 What we have here is the enterprise that is
22 alleged is GNK and High Lawn, but I mean GNK and High Lawn.

23 THE COURT: It's okay, I'll understand.

24 MS. DIGLIO: And that defendant Aminov, together
25 with unknown persons, exerted control over GNK to organize

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1 the racketeering activities. The racketeering activity is
2 the mail fraud.

3 THE COURT: Right.

4 MS. DIGLIO: So the problem is that in
5 Paragraphs 34 and 125 of the complaint the plaintiffs allege
6 that GNK and High Lawn were formed for the singular purpose
7 of fraudulently billing carriers. For the singular purpose.

8 So case law in this circuit, in this
9 district, *Atkins V. Apollo*, holds that:

10 *"In a fraud-based RICO claim, if the sole*
11 *purpose of the alleged enterprise is to perpetrate*
12 *the alleged fraud there can be no enterprise for*
13 *RICO purposes."*

14 So I think, your Honor, what we have here is
15 a garden variety fraud claim couched in RICO language. This
16 company exists solely to provide medical supplies to persons
17 injured in car accidents and to bill Allstate and the
18 insurance carriers for those enterprise. You take away the
19 racketeering activity, which is the mail fraud, which is the
20 mailing of the bills, this entity doesn't exist. It only
21 exists to do that billing. Why else would it be in
22 business? It can't be in business without the alleged
23 racketeering activity.

24 Now, plaintiffs try to correct this in the
25 opposition to the motion, state that plaintiffs and GNK

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1 would exist if the racketeering activity were removed from
2 the equation. But as I said, how can that be? It can't be.
3 It can't be that they would exist if you remove the
4 racketeering activity. So it's not distinct. The
5 enterprise is not distinct from the racketeering activity,
6 that's our argument.

7 THE COURT: Wasn't the same thing true in
8 *Turkette*? They weren't, like, they didn't have legitimate
9 side jobs. All they were doing was dealing drugs and
10 obstructing justice, burning things down and the like. They
11 wouldn't have existed, but for their racketeering activity.

12 MS. DIGLIO: Understood. And there's other case
13 law that says that courts should be on the lookout for cases
14 that are -- fraud cases that are -- and I'll quote from
15 *Maersk* that are really nothing more than an ordinary fraud
16 case.

17 THE COURT: I understand. That argument got lost
18 about 25 years ago. Lost in *Sedima*, got lost in H.J. People
19 have been griping about this civil RICO cause of action for
20 a long time and the courts have been saying, "Take it to the
21 Congress, we didn't write this thing." I read your brief.
22 You're doing it again. It's like this is a garden variety
23 fraud case but may be so --

24 MS. DIGLIO: Except in the other complaints that
25 I've read it's never been alleged that the sole purpose for

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1 the corporation, or for the P.C., the corporation in this
2 case, but P.C.s are medical professional corporations and
3 other claims. The sole purpose for their existence was to
4 perpetrate this fraud which is specifically alleged by the
5 plaintiffs.

6 THE COURT: You think your problems are too
7 undilutedly evil to be RICO defendants. They have to have
8 some legitimate connection?

9 MS. DIGLIO: My argument is they may be fraud
10 defendants but not RICO defendants.

11 THE COURT: And that's because there are two
12 undilutedly criminal to qualify.

13 MS. DIGLIO: Allegedly. Well, if they're all --

14 THE COURT: Let me finish, he's taking it down.

15 MS. DIGLIO: Okay.

16 THE COURT: Let me finish.

17 MS. DIGLIO: Okay. Sorry.

18 THE COURT: Because they don't do some decent
19 law-abiding stuff on the side they don't get to be RICO
20 defendants. That's a weird rule.

21 MS. DIGLIO: It's not my contention that they have
22 to do some other law-abiding stuff on the side, but when the
23 plaintiffs say they've only been created to perpetrate this
24 fraud then that --

25 THE COURT: I thought that was the precise

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1 argument that the First Circuit bought in *Turkette* and the
2 Supreme Court blew out of the water.

3 Is it?

4 MS. DIGLIO: I don't believe so.

5 THE COURT: I'll have to reread the case because I
6 thought what the First Circuit said was that you can't have
7 a purely illegitimate enterprise because of the waif 1961(4)
8 was drafted at the association-in-fact because he used the
9 *Generis* principle, however that gets pronounced, applies to
10 that definition of enterprise and the Supreme Court said,
11 "No, that's wrong."

12 The Government won in *Turkette*. People
13 arguing against the argument you're making here won, and
14 that's the Supreme Court of the United States. So what
15 exactly would you have me done with that scenario?

16 MS. DIGLIO: *Turkette* was a criminal case and the
17 language in *Turkette*, I believe the language in *Turkette*
18 applies in this case in our favor.

19 THE COURT: All right. Great. Thank you.

20 What else?

21 Any other arguments you want to make in
22 connection with RICO claim or anything else for that matter?
23 I read your briefs.

24 MS. DIGLIO: You have my brief.

25 THE COURT: You're welcome to enhance or emphasize

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1 anything.

2 MR. VALERIO: Just to clarify on two elements in
3 the brief.

4 Reliance. We show to the Court through the
5 briefs that in the No-fault System, insurers have the
6 unqualified right to question the veracity, the accuracy,
7 and any other aspect of any bill that they have received.

8 Look at the allegations here. What they're
9 saying is: We received a bunch of bills, we looked at them,
10 we decided to pay them, and then we woke up four years later
11 and realized that there was something wrong with them. This
12 is contrary to both general principles governing fraud and
13 no-fault principles.

14 The courts have consistently ruled if you,
15 sophisticated party, have an opportunity, or are granted by
16 the applicable statutes, an opportunity to do your due
17 diligence and you don't you can't come back years later and
18 claim that you were defrauded. The due diligence should
19 have been done. This is general fraud.

20 In no-fault, specifically, the rule is
21 clear -- if an insurer requests verification of a claim, and
22 that is a technical term, which means issues a letter saying
23 I want to know A, B, C, D through Z or whatever other
24 information they want. If the provider doesn't respond
25 satisfactorily, and, by the way, the insurer is the only

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1 judge of whether or not the answer is satisfactory at the
2 claim stage the insurer doesn't even need to pay or deny.

3 Now, the brief by Allstate completely
4 neglects to discuss this portion. They just say: We have
5 only 30 days, we got to do something in haste. It's not so.
6 They have all the time on earth. Appellate case law
7 demonstrates that if a provider sues while a verification
8 request is still outstanding, the claim will be dismissed as
9 not ripe. Why? Because the insurer has the right to
10 receive the information that they request.

11 How does this play out in our argument? Very
12 simply, whatever reliance they are alleging is not
13 justified. We annexed to our motion a bill. Now, they say
14 this bill doesn't inform Allstate of the type of equipment,
15 or the nature of the equipment, how much it costs, et
16 cetera, et cetera. It's right there, they have it in their
17 face, and they can hold on to it for 30 days. Now, if they
18 don't do it, if they don't challenge it within 30 days,
19 that's it.

20 The Court of Appeals has said conclusively:
21 You can question a fraudulent bill but you must do it within
22 the No-fault System, within the time lines, the deadlines,
23 within the procedures set forth in No-fault. You don't do
24 it, game's over.

25 THE COURT: Reasonableness in just about every

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1 context, though, and I hear your argument, but
2 reasonableness in just about every context whether it's
3 negligence with this due diligence obligation is kind of a
4 quintessentially a fact determination and I'm not persuaded
5 that this is something that I can resolve on a §12(b)(6)
6 motion.

7 MR. VALERIO: I will be happy to address that
8 concern.

9 THE COURT: How can I determine as a matter of law
10 with respect to all of these claims that there was no
11 reasonable reliance. It me that's going to be so intensely
12 fact bound.

13 MR. VALERIO: At least so much of the complaint as
14 alleges that there was inherently wrong on the bills; that
15 the bills are facially defective or misleading or false. At
16 least so much of the complaint that alleges that much should
17 be dismissed as a matter of law. There is no justifiable
18 reliance.

19 I respectfully disagree with the fact that
20 you cannot address it as a matter of law, but even if you
21 want to leave to as a factual determination for later
22 determination at least the portion of the complaint that
23 says, or that questions the facial validity of the bills,
24 must be resolved as a matter of law. They cannot inject an
25 issue of fact into something that they had in their face.

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1 THE COURT: Okay. I understand.

2 MS. DIGLIO: If I might just add a little
3 corollary to that?

4 For example, there is items that were billed
5 in accordance to fee schedule and some that were billed in
6 accordance with their non-fee scheduled items, and the
7 complaint makes that pretty clear. At least with respect to
8 the fee scheduled items, there are several allegations in
9 the complaint that these items were miscoded and that they
10 were coded incorrectly and that some of the bills had codes
11 on them that didn't exist in the workers' compensation fee
12 schedule.

13 I submit that that's what my colleague is
14 arguing -- that those are facial -- these are facially --
15 that there's no misrepresentation. The bill is the bill, it
16 says on it exactly what it says. So there is no
17 misrepresentation, this is it. And as sophisticated insurer
18 will be able to say: Well, oh, that's not the right code
19 for that, or that doesn't exist. In that case, it's argued
20 in my brief as well that there is no reliance on that as
21 well.

22 MR. TSIRELMAN: If I may, your Honor, if I can
23 just add.

24 I would like to also point out to the Court
25 that in this case perhaps different from any other cases in

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1 that the insurer receives thousands of bills not only from
2 this supply company but from hundreds of supply companies.
3 So being on the receiving end of thousands of bills it can
4 certainly look at the bills that it receives from everyone
5 else and compare this client's bill to someone else's when
6 they receive a bill for the same item, and in that way that
7 reliance is simply unreasonable.

8 They cannot receive bills from thousands of
9 clients, thousands of supply companies, who, for example,
10 billed a hundred dollars for a supply then receive a bill
11 from this supply company that billed them a thousand dollars
12 for the same supply and say: We're just going to pay it.
13 We're going to close our eyes. We'll pay it and we'll sue
14 them later.

15 This leads, your Honor, so some very strange
16 results. An insurance company that is diligent in reviewing
17 each and every bill at the time it receives them within the
18 30 days as the No-fault Law allows gets nothing from my
19 client. An insurer that is negligent pays the claim, has
20 the right to now get that money back in triplicate. The
21 negligent behavior in this case rewards the insurance
22 companies and that cannot be the case.

23 THE COURT: Thank you. Anything further from the
24 moving defendants.

25 MS. DIGLIO: No, your Honor.

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1 MR. VALERIO: No, your Honor, but with the Court's
2 permission I would like to reserve five minutes for reply.

3 THE COURT: We don't do time. But it's your
4 motion so you'll get a reply.

5 MR. VALERIO: Thank you.

6 MR. NATBONY: Good morning, your Honor.

7 THE COURT: Maybe I should do time. Get one of
8 those lights.

9 MR. NATBONY: Good morning, your Honor.

10 If I may, I'd like to address the arbitration
11 issue first.

12 THE COURT: Yes.

13 MR. NATBONY: As to that issue, actually, same
14 counsel were before your Honor back in October on this very
15 issue in the *Allstate versus Lyons* case. And, in fact, the
16 oral argument for that case for another reason was actually
17 attached to our papers. So to the extent that I won't
18 repeat that argument since it's already in these papers and
19 I trust your Honor will be able to read that. But what I'd
20 like to do is focus on a couple of arguments that were made
21 in the reply papers that we didn't have an opportunity to
22 respond to and address, the *CompuCredit* decision which came
23 down after our initial papers.

24 Our initial papers, obviously, included the
25 argument that affirmative recovery actions are addressed by

1 *Mallela*; that they're outside the normal No-fault claims
2 process; that, there no more claims left, they've been paid;
3 there are no claimants, and that this issue has decided by
4 *Progressive* by Judge Gammerman.

5 But as far as Insurance Law §409 I think it's
6 important to talk about that and the *CompuCredit* decision.
7 What I heard from my colleagues is that they admit that
8 Section 409 provides the right of insurers to file actions
9 to, in fact, enforce and initiate actions when there is
10 insurance fraud that has to be dealt with. Significantly,
11 Section 409 gives the insurers the right not only to
12 prosecute such actions but to initiate such actions. Those
13 are the words in the statute. So, in fact, §409 puts the
14 decision about where and how to commence civil actions into
15 the insurers because of the use of the word initiate.

16 Now, relying on *CompuCredit*, what I'm hearing
17 is the argument is that because insurers would have the
18 right to initiate an arbitration that would be a civil
19 action and, therefore, they would have the right that is
20 recognized by Insurance Law 409. Well, the problem is
21 that's just dead wrong because insurers do not have the
22 right to commence an arbitration, and this is the key
23 difference between here and *CompuCredit*.

24 In *CompuCredit*, you had a situation where
25 there was a law that said: A consumer can sue a credit

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1 repair agency. Okay, well that's fine. And then the issue
2 became, well, does suing mean an arbitration or a lawsuit?
3 The arbitration clause in that case said that both sides had
4 the ability to commence an arbitration. It says, "Upon the
5 election by you or us, issues will be resolved by binding
6 arbitration." So no dispute there that the consumer had a
7 right to commence an arbitration. Here Section 409 of the
8 Insurance Law says that insurers have the right to initiate
9 civil actions to deal with fraud.

10 In the case of *Country-Wide versus Harnett*,
11 426 F. Supp. 1030 decided by Judges Lumbard, Griesa, and
12 Goettel make it absolutely clear that under the arbitration
13 provisions of No-fault insurers cannot initiate
14 arbitrations, and that's because of the language of the
15 arbitration provision. It says, "An applicant for benefits
16 may initiate arbitration proceedings," that's not an
17 insurer. They're the applicant for benefits.

18 And even if you look to the actual No-fault
19 contract which they have cited to that says that you have to
20 look at the arbitration provisions as set forth in the
21 regulations promulgated by the Superintendent, and those are
22 that only an application for first-party benefits has the
23 right to commence an arbitration.

24 So here's the problem. Under their theory,
25 they're saying arbitration right replaces Insurance Law

1 §409. The problem is insurers do not have the right to
2 commence an arbitration proceeding. So what happens? Well,
3 there has to be a way to reconcile Insurance Law §409 to
4 recognize those insurers' rights, which they've admitted we
5 have, you heard him saying, "We can do whatever we want
6 under §409," and the arbitration provision. And the way to
7 do it is exactly what Judge Gammernan did in the *Progressive*
8 case -- to recognize there is a difference between an
9 arbitration proceeding that they can institute when there is
10 a claim or a No-fault claim pending to deal with these
11 issues and something different, which is an affirmative
12 recovery action once that claim process has finished which
13 insurers have under §409 under things like RICO, common law
14 fraud, unjust enrichment which is what is here.

15 So in that respect *CompuCredit* does not help
16 them. It, in fact, reemphasizes why *Mallela* and other cases
17 and *Progressive* have all recognized this independent
18 affirmative right of recovery for insurers.

19 With respect to the other arguments, I would
20 defer, at least on the arbitration, to the arguments set
21 forth in our previous argument on the *Lyons* case.

22 Now, the other issue I would like to touch
23 briefly on even though my colleagues didn't mention it was
24 the argument with respect to joinder which they've made.

25 Under Rule 20(a)(2), the real question here

Oral Argument

25

1 is: Do the claims that we have asserted arise out of the
2 same transaction or occurrence or series of traffics or
3 occurrences, and are the claims logically connected? Are
4 they logically connected in a way that would make sense for
5 them to be in the same proceeding?

6 Unlike what the defendants have argued in
7 their motion, there is no illustrated disconnected nature of
8 these claims. To the contrary, the complaint shows
9 remarkably consistent fraudulent conduct by the defendants
10 which can only be explained by concerted or joint conduct
11 rather than coincidence. Nowhere do the defendants point
12 out any significant differences between the allegations
13 knowledge the various defendants and there's a good reason
14 because they can't.

15 I mean, let's take a look at the cases that
16 they cite. *Lyons*, for instance, *Lyons* was a case where we
17 were talking about copyright infringement. And in *Lyons*,
18 what happened is people just used the same portal or website
19 to steal music. That was the only thing that was the same.
20 Okay. Well, people can make independent decisions to go use
21 that website to steal music. There is no real logical
22 connection there -- I'm sorry, that was *Arista Records*.
23 *Lyons* was a case in costumes where they found a few
24 different costume shops that were knocking off characters.
25 Was there any allegation that the costumes were the same;

Oral Argument

26

1 that the characters were the same, no. Again, this could be
2 an instance of shops merely deciding that they could make
3 money by knocking off costumes. Where was the logical
4 connection? The court said there was none.

5 How about the *Nassau County* case? In the
6 *Nassau County* case, there was something like -- the number
7 may be off -- but 164 different insurers, and the
8 allegations that they were terminating agents improperly.
9 Well, the problem was the reasons were all different and the
10 timings were all different. So there was no logical plan,
11 no logical way to connect all of these.

12 Here, the similarities in actual conduct,
13 methods, fraudulent statements, patterns, and tools cannot
14 be explained by independent conduct. There is no other
15 rational explanation other than joint communication, plan,
16 or action. When you are submitting bills and you have to
17 come up with a phantom code number to put into the bill how
18 is it that that phantom code number was the same for all
19 these defendants? How is it that the same improper billing
20 codes are being used by all the defendants? How is it that
21 it's all the same equipment?

22 THE COURT: I understand the argument.

23 MR. NATBONY: So with that respect, and I would
24 also argue simply as a matter of judicial economy, it
25 doesn't really make sense when you've got all this logical

Oral Argument

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1 connection to have seven different lawsuits out there with
2 seven different or six or seven different lawsuits which is
3 in essence what they're saying because they're saying it
4 should be severed, dismissed and severed. I mean, they
5 should be dealt with in one forum now and here. Thank you,
6 your Honor.

7 THE COURT: Thank you.

8 MS. BURGOS: Your Honor, with the Court's
9 permission, I will address the issues raised with respect to
10 the RICO and fraud pleadings.

11 First, I think it should be noted that if we
12 were to set aside the facts that the defendants that are
13 represented by Ms. Diglio and Mr. Blodnick have moved to
14 dismiss claims that weren't even pled such as an
15 association-in-fact enterprise that the plaintiffs didn't
16 plead, or a conspiracy claim that the plaintiffs did not
17 plead, or an aiding and abetting claim as against her
18 clients, GNK and High Lawn, which the plaintiffs did not
19 plead as against them I think we get down to what arguments
20 they do make. And I think the arguments that they do make
21 can be rejected out of hand because they're not supported by
22 the allegations in this case, or by relevant case law.

23 First, to the extent that they claim that the
24 RICO pleadings fail because the plaintiffs failed to allege
25 a distinction between the enterprise and the pattern of

Oral Argument

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1 racketeering activity, they're wrong.

2 Number one, the plaintiffs did not plead an
3 association-in-fact enterprise, they have pled a legal
4 corporate entity enterprise.

5 Number two, in 2009 the Supreme Court handed
6 down the *Boyle versus United States* decision that said that
7 there is no distinction that is required between the
8 enterprise and the pattern of racketeering activity. But
9 even if that weren't the state of the law, which it is,
10 the plaintiffs have sufficiently alleged that the
11 enterprises exist separate and apart from the racketeering
12 acts. Racketeering acts being the submission of hundreds,
13 if not thousands, of fraudulent claims that materially
14 misrepresent that they provided DME and/or orthotic devices
15 that weren't provided that were provided, if at all,
16 pursuant to a fraudulent medical protocol that were provided
17 with codes that do not exist, or with codes that were
18 substantially upcoded.

19 In addition to that, what I think is
20 important to note is that the plaintiffs have included
21 allegations that the enterprises paid kickbacks to no-fault
22 clinics in exchange for prescriptions. Paid kickbacks to
23 wholesalers in exchange for inflated wholesale invoices.
24 They exerted efforts to obtain prescriptions from no-fault
25 clinics pursuant to a fraudulent medical protocol and not

Oral Argument

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1 based on medical need, and exerted efforts to ensure that
2 the no-fault clinics that were providing them with the
3 prescriptions took the necessary steps to obtain the
4 claimants' signatures on documents that they knew would be
5 required in order to make their submissions to the insurers.

6 So at bottom, even if we were to separate the
7 enterprise from the racketeering acts, I respectfully submit
8 that the enterprises would still exist so that argument
9 fails.

10 THE COURT: All of your alleged the enterprises
11 for RICO counts are P.C.s; correct?

12 MS. BURGOS: They're corporation, yes, your Honor,
13 corporate entities.

14 THE COURT: Professional corporations?

15 MS. BURGOS: Not professional corporations in this
16 particular case, they're business entities. They're Inc.s
17 to the extent.

18 THE COURT: None of them is also a RICO defendant?

19 MS. BURGOS: None of the corporate entities is
20 also a RICO defendant, no, your Honor.

21 THE COURT: And it's true that your allegation is
22 that the sole purpose of these corporate entities is to
23 commit the fraud, commit the fraud you charge.

24 MS. BURGOS: Yes, your Honor.

25 Your Honor, to the extent that they also

Oral Argument

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1 argue that the RICO allegations or the RICO claims fail
2 because the RICO enterprise isn't different from the person
3 I respectfully submit that that's wrong, too.

4 Number one, when the enterprises alleged are
5 corporations that distinction requirement is satisfied
6 simply by naming as RICO persons the corporate owners or
7 employees or other people that acted and participated in the
8 racketeering activities in furtherance of the scheme to
9 defraud and that's what we have here. We've got GNK Medical
10 Supply as one enterprise, we've got High Lawn Medical Supply
11 as a separate enterprise, and we've got their individual
12 owners as the RICO persons. So that distinction requirement
13 is satisfied as pled in the complaint.

14 To the extent another basis that they
15 challenge the RICO claims is based on the plaintiff's
16 failure to properly plead mail fraud that is unsupported by
17 the pleadings in this case.

18 Number one, with respect to GNK, the
19 plaintiffs have alleged that over the course of three years,
20 and with respect to High Lawn two years, that defendant
21 Aminov engaged in a pattern of racketeering activity which
22 was -- which purpose was to defraud the plaintiffs into
23 paying fraudulent bills; that he participated in the
24 racketeering activity by submitting those fraudulent bills;
25 that those acts were remit the since they were intended to

Oral Argument

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1 further the same criminal enterprise, and we've also
2 satisfied the continuity requirement because those acts
3 occurred over a substantial period of time and won't -- and
4 there's open-ended continuity because they won't be stopped
5 and pose a certain threat to continue into the future if not
6 halted by civil or criminal prosecution.

7 THE COURT: Does open-ended continuity, does
8 demonstrating that require you to show that as we sit here
9 today that there's a threat to continuity into the future?

10 MS. BURGOS: Well, at the time of the pleadings,
11 yes, your Honor. And even if that were the requirement,
12 that is the case here because on the underlying issues, or
13 on the underlying bills, the defendants continue to seek
14 reimbursement under the No-fault Law.

15 THE COURT: What if they didn't? What if they
16 were up and running one of these corporations that was
17 formed you allege solely to commit no-fault fraud. And
18 they're up and running for two months and then they're shut,
19 down and they're indisputably gone, it's dissolved. There's
20 no closed-ended continuity for that period of time. Are you
21 out of luck on your RICO claim because there's no threat
22 of -- there's no threat of continuity?

23 MR. STERN: Your Honor, if I may?

24 With respect to open continuity, the Supreme
25 Court has held, and this Circuit has held, that two months

Oral Argument

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1 and a matter of weeks can actually be sufficient if there is
2 a continuing ongoing threat of criminal activity but for the
3 RICO action that would have continued or whether --

4 THE COURT: I'm not saying about the RICO action.
5 Just suppose they went belly up some reason other than you
6 stepping in. So there's no current threat of continuity
7 going forward at the time the complaint is filed can you
8 still satisfy the pattern requirement?

9 MR. STERN: If it was open-ended continuity and
10 we're looking at a very short duration, and there was -- and
11 the reason for the termination of the enterprise was because
12 of reasons other than law enforcement or civil action and
13 I'm not sure that any court has addressed that specific
14 issue, your Honor.

15 THE COURT: What if they had to? What would you
16 tell them to do?

17 MR. STERN: I would tell them, I mean, it is in
18 our fact pattern here. We have a closed end, we satisfied
19 that in substantial duration. If I were to advise the
20 Court, your Honor, if I may, I would say that if you had
21 sufficient racketeering activities going over the course of
22 a couple of months, and the lawsuit followed, that it would
23 be sufficient to bring a lawsuit.

24 THE COURT: All right. Sorry to interrupt you.
25 Go ahead.

Oral Argument

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1 MS. BURGOS: Your Honor, with respect to the mail
2 fraud pleadings, the complaint is replete through the body
3 of the actual pleadings with examples of the fraudulent
4 misrepresentations made by the defendants.

5 In addition to that, we have no less than 42
6 exhibits in the appendix to the complaint in which each of
7 the exhibits specify what the misrepresentation was,
8 provides the claimant's initials, the claim numbers, the
9 specific billing codes that the defendants used that
10 plaintiffs take issue with, the name of the entity, and the
11 specific wrong.

12 In addition to the 42 exhibits, we've got an
13 appendix of predicate acts that includes, among other
14 things, the claimant's initials, the claim numbers, the
15 documents that the defendants submitted, the date of service
16 for the DME items that were included on the bills submitted,
17 the fraudulent misrepresentations included on those bills.

18 And so, with the specific examples in the
19 body of the complaint, the exhibits attached to the
20 complaint, the detail included in the predicate acts, it is
21 just not understandable that any argument can be made that
22 the plaintiffs have failed in their allegations to
23 sufficiently plead mail fraud.

24 To the extent that the defendants also argue
25 that the mail fraud aspect of plaintiff's complaint fails

1 because the plaintiffs fail to include copies of the actual
2 bills, well, the courts have clearly indicated in this
3 district and others that that's not required. That to the
4 extent that in RICO there is a particular particularity
5 requirement that it is enough where a plaintiff delineates
6 with adequate particularity in the body of the complaint the
7 specific circumstances constituting the overall fraudulent
8 scheme.

9 Plaintiffs have included what the fraudulent
10 misrepresentations were in the body of the complaint.
11 They've particularized the fraudulent statements made in
12 detail in the exhibits and in the predicate acts table. To
13 the extent that the defendants also claimed that the
14 complaint, or the predicate acts table, is deficient because
15 there is in distinction between bills I respectfully submit
16 that that's incorrect. The bills are separated or the
17 claims are separated, and clearly identified by claimant's
18 initial and claim number.

19 So that the defendants are clearly aware and
20 on notice of what the allegations are as against them, and
21 so the particularity requirement as to the mail fraud is
22 sufficiently pled. There is one argument that the
23 defendants represented by Mr. Blodnick and Ms. Diglio
24 include in their papers with respect to the RICO claims
25 being time barred, and I respectfully submit that based on

Oral Argument

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1 allegations in this complaint there is just no merit for
2 that.

3 Number one, the causes of action with respect
4 to GNK indicate that the participation in the affairs of the
5 enterprise began in 2008. With respect to High Lawn began
6 in 2009. The original complaint was filed in May of 2011.
7 The first amended complaint was filled in August --

8 THE COURT: I get it. So everything is within the
9 statute.

10 MS. BURGOS: Correct, your Honor.

11 Now, I think it should be noted that with
12 respect to the RICO claims, it is only those defendants
13 represented by Ms. Diglio and Mr. Blodnick that have made
14 any challenge whatsoever to those RICO claims.

15 With respect to the defendants represented by
16 Mr. Tsirelman and Mr. Valerio, their only challenge to
17 plaintiff's claim as it relates to the pleading is with
18 respect to the fraud claim. And there they made two, both
19 defendants, make two similar arguments both of which should
20 be rejected by the Court.

21 The first being that the complaint is not
22 sufficiently specific because the allegations are -- don't
23 set forth what the fraudulent misrepresentations are with
24 the particularity or the specificity required for a fraud
25 claim;

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1 And, number two, the second argument that
2 they spent much time about today and that is that it is just
3 not reasonable for a sophisticated insurer such as the
4 plaintiffs to rely on their own documents.

5 Well, for the same reasons that the
6 plaintiffs' complaint satisfactory the particularity
7 requirement, I respectfully submit that the fraud claim as
8 pled against all these defendants is sufficient. It
9 provides them with information as to the basis of the
10 allegations, the basis of the claim. It provides them with
11 specific details and exhibits, the predicate acts, and the
12 actual body of the complaint.

13 And with respect to the reliance aspect.
14 Your Honor correctly indicated, or recognized, that whether
15 it's reasonable or not for the insurers to rely on their
16 documents is an issue that is not appropriate on a motion to
17 dismiss. It is an issue of fact so that it's not something
18 that's within the realm of the motion that's currently
19 pending before the Court.

20 THE COURT: What's your response to their argument
21 about facially defective.

22 MS. BURGOS: Well, with that, your Honor, I think
23 one thing is key. The courts have unanimously indicated
24 that insurers have the right to rely on facially valid
25 claims, and the reason for that -- on facially valid claims.

Oral Argument

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1 And the reason for that is this -- in No-fault, there is a
2 strict 30-day requirement for the insurers to act.

3 THE COURT: I'm not talking about facially valid
4 claims.

5 MS. BURGOS: From an insurance perspective, they
6 are facially valid. I mean, they're the ones that are
7 representing on the face of the document that this is the
8 code that pertains to this particular item. This is the
9 price that pertains to this particular item, and when you're
10 dealing with an insurer that is processing hundreds, if not
11 hundreds, of thousands of claims they have to be able to
12 rely on what's on the face of that claim. And so, what the
13 plaintiffs have pled is that they did rely on the face of
14 those claims. We've satisfied at a minimum the elemental
15 pleading requirement that the plaintiffs justifiably relied
16 on the documents that they submitted in support of their
17 claims for reimbursement.

18 THE COURT: What if the deficiency is patent on
19 the face of the claim nonetheless rely on it? Shouldn't
20 that be unreasonable reliance.

21 MS. BURGOS: Your Honor, that gets back to what
22 your Honor recognized earlier. Whether it's reasonable or
23 unreasonable.

24 THE COURT: What if it's phantom code? What if
25 it's a code that doesn't exist? And so, I just got to look

Oral Argument

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1 at it and you can see if there is a problem with it. Would
2 reliance on that be unreasonable.

3 MS. BURGOS: Your Honor, again, to the extent
4 we're talking about reasonableness it's not an issue for a
5 motion to dismiss. Now, what it gets back to this is
6 this --

7 THE COURT: It might be, as a matter of law, would
8 not be reasonable reliance. It could be a motion to dismiss
9 issue, that's what I'm asking you.

10 MS. BURGOS: And I don't think, your Honor, that
11 on its face with 30 days to process hundreds of thousands of
12 claims that an insurer can make that determination. They
13 got to take their bills at their face, accept that they have
14 represented that this is what it says it is, and process
15 that claim.

16 THE COURT: So they're excused from the due
17 diligence requirement because they didn't hire enough people
18 to review the claims in the 30 days.

19 MS. BURGOS: It's not a matter of due diligence,
20 your Honor. It's a matter of satisfying what their
21 obligations are under the law to promptly reimburse these
22 claims. That's the overarching purpose of the No-fault Law
23 and that is to promptly reimburse these claims. So that is
24 what they're doing -- they rely on the bills, they make
25 their determination they pay, and, consistent with what

Oral Argument

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1 Mr. Natbony indicated, the law is set forth such that if
2 after the fact they come across evidence or information that
3 supports that the original bills that they dutifully
4 processed were fraudulent in any way, shape, or form they
5 are entitled, they have the right to initiate action to get
6 that money back.

7 THE COURT: This case consists solely of that type
8 of a claw-back type of recovery being sought. Are there any
9 claims that were not paid that are the subject of this
10 lawsuit?

11 Do you understand the distinction.

12 MS. BURGOS: Yes, your Honor. These are all
13 claims that had been paid.

14 THE COURT: Okay.

15 So there is no sense in which the defendants
16 here are in the posture that you say is contemplated by the
17 arbitration provision -- a person making a claim for
18 first-party benefits. We don't have any of those in this
19 case?

20 MS. BURGOS: No, your Honor.

21 MR. STERN: Your Honor, if I may, just one thing:

22 While Ms. Burgos was addressing the Court, I
23 revisited your hypothetical if you may.

24 THE COURT: You want to revise your answer?

25 MR. STERN: I have revised my answer, and I think

Oral Argument

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1 under prevailing case law, not our facts here, but under
2 prevailing case law I think that it probably would not be
3 sufficient to stay the cause of action under the open-ended
4 continuity test.

5 THE COURT: Okay.

6 MR. NATBONY: Your Honor, may I just ask on the
7 *CompuCredit* issue would you prefer that I submit something
8 in writing, or will the record of the argument be
9 sufficient?

10 THE COURT: If I want something I'll ask for it.

11 MR. NATBONY: Thank you, your Honor.

12 THE COURT: Anything else from the plaintiff's
13 side.

14 MS. BURGOS: Your Honor, I will rely on our brief
15 to address the issues raised by defense counsel with respect
16 to the unjust enrichment claim except to say that the
17 argument that they've raised has been squarely, repeatedly,
18 and unequivocally rejected by courts time and again in this
19 district. So I will rely on the arguments with respect to
20 the unjust enrichment claim.

21 THE COURT: Thank you.

22 MS. BURGOS: Thank you, your Honor.

23 MR. VALERIO: I have to be brief otherwise I'm
24 going to get a parking ticket so starting with the last
25 point addressed by your Honor.

Oral Argument

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1 There are thousands of fee schedule disputes
2 litigated in court where an insurer reviews a bill or
3 receives a bill, reviews it, and says: You billed too much,
4 let me reduce the payment.

5 Now, to claim that they didn't have time, or
6 they are so overworked that they can't do it is disingenuous
7 and let's just leave it at that.

8 In terms of *Mallela* now, this is important as
9 a distinction. *Mallela* involved the situation in which the
10 professional corporations could never have billed for their
11 services. They were not entitled, as a matter of law, to
12 get paid. The Court of Appeals said: Under the
13 circumstances, you insurers can go and get your money back
14 because they couldn't have gotten it to begin with.

15 The situation before the Court is completely
16 different, and it's governed by *Fair Price* where the Court
17 of Appeals said, well, there was an accident. The policy
18 obligations were triggered. What Travelers in that case was
19 arguing there was billing fraud, and the Court said you
20 didn't do it in a timely fashion.

21 Why am I saying this? They keep on saying
22 that *Mallela* allows this type of action the one before you,
23 it doesn't. It doesn't. *Fair Price* instead precludes it.
24 §409, Section 409, they try to distinguish it by saying
25 insurers cannot start arbitrations.

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1 So what is the import of that comment? The
2 No-fault Law gave one party, and one party only, the right
3 to elect arbitration. §409 did not overrule that provision.
4 There is an imbalance, if you will, in No-fault and this is
5 the price at that claimants had to pay in order to have
6 their claims paid expeditiously.

7 THE COURT: Sorry to interrupt, and I take no
8 responsibility if you get a ticket, but the -- is the
9 arbitration issue in this case the same as it was in *Lyons*.

10 MR. VALERIO: No. It's before the Court, we have
11 the arbitration clause in the contract.

12 THE COURT: Okay.

13 MR. VALERIO: We're not relying on §5106, we're
14 showing you the contracts.

15 THE COURT: Right. I thought it was different.

16 MR. VALERIO: And again, consider what they're
17 saying. Because we already paid, this is no longer under
18 the purview of that provision, that's absurd. Why? Because
19 countenance in this proposition would allow insurers to just
20 pay everything, and instead of 30 days have six years to go
21 and challenge a claim that's absurd. First.

22 Second, by its own language, this falls
23 within the clause. The defendants here are entities that
24 received payment for first-party benefits.

25 Now, there is a dispute. The insurer says:

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1 You're not entitled to those because the bills are
2 fraudulent, and whatever other litany of complaints they
3 have. That's the central dispute about those claims.
4 Without those claims, there would be no dispute.

5 Finally --

6 THE COURT: Who's got the right to arbitration?
7 The person making the claim for first-party benefits?

8 MR. BLODNICK: Or their assignee. Or their
9 assignee?

10 THE COURT: Could you not interrupt.

11 MR. BLODNICK: I'm sorry, your Honor.

12 MR. VALERIO: And only that person. And again,
13 this is the price.

14 THE COURT: Do I have any such person before me?

15 MR. VALERIO: Well, yes, your Honor.

16 THE COURT: Because I don't understand you to be
17 making a claim for first-party benefits. You made it, you
18 got paid.

19 MR. VALERIO: Right. We're still -- any issue
20 arising under that claim must be arbitrated.

21 MR. TSIRELMAN: Your Honor, if I may add to that,
22 please.

23 The assignments the in Insurance Law are not
24 simple assignments. When we get an assignment --

25 THE COURT: I don't mean to suggest that it's the

Oral Argument

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1 assignment that might be the problem. I mean to suggest the
2 fact that the claim got paid.

3 MR. TSIRELMAN: I am getting to that.

4 THE COURT: Okay.

5 MR. TSIRELMAN: I'll make it short. When the
6 claim --

7 THE COURT: You don't have to.

8 MR. TSIRELMAN: Okay.

9 THE COURT: It's not my car out there.

10 MR. TSIRELMAN: When we receive an assignment or
11 where a medical provider or a supply company receives an
12 assignment and submits its bill, when that bill is paid the
13 assignment is not extinguished.

14 For example, if the supply -- if the same
15 supply company receives another prescription for a supply,
16 and has to send another bill to the insurance company, it
17 does not need another assignment. Once it receives the
18 first assignment, they become the assignees to eternity. So
19 with each and every bill, they do not need to get a new
20 assignment. The first assignment is enough to submit each
21 and every bill for the next 20 years. And as long as
22 there's a controversy, as long as there is a dispute between
23 the parties, the assignment is valid; they're still the
24 assignees.

25 THE COURT: All right.

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1 MR. BLODNICK: Can I be heard, your Honor?

2 THE COURT: Not yet.

3 Are you finished.

4 MR. TSIRELMAN: Yes, your Honor.

5 THE COURT: And you, sir.

6 MR. VALERIO: The FAA, your Honor, by its own
7 terms applies to dispute. The clause is clear, it's broad.
8 It applies to any dispute regarding any matter relating to
9 the claim. Not only when we asserted in a first-party
10 action, but also like here when the validity of those claims
11 is questioned.

12 Thank you, your Honor.

13 THE COURT: Thank you. Yes, sir.

14 MR. BLODNICK: Your Honor, it really boils down to
15 these five lines here:

16 *"In the event any party making a claim for*
17 *first-party benefits and the company do not agree*
18 *regarding any matter relating to the claim."*

19 Now, your Honor is questioning whether any
20 matter related to the claim is including a matter to try to
21 get the money back for a claim paid I believe it is. That's
22 the first part, that's the first issue your Honor has to
23 determine. Is it a claim to get the money back relating to
24 the claim, I believe that it is.

25 The second argument made is that the

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1 insurance company -- that the Superintendent of Insurance
2 determines whether it is an arbitration or not. That's not
3 what the language says which my learned adversary argued.
4 It's really a ministerial act. We, as the assignee, have
5 the right to the arbitration.

6 So what would happen is with §409 they have a
7 trite start the action and then we have a right to a stay
8 and to commence an arbitration to resolve the dispute. We
9 have the right to select the forum in which the claim is
10 determined, they don't, I agree with them. Under §409 they
11 don't have the option but we do have the option.

12 Thank you.

13 THE COURT: Thank you. I'm going to reserve.

14 MR. VALERIO: May I make one clarification?

15 THE COURT: No.

16 MR. VALERIO: Thank you, your Honor.

17 THE COURT: On motion to compel arbitration, I
18 will reserve on that I'll decide that in writing. The rest
19 of these motions are denied. I'm not going to belabor the
20 record with it. I have related cases in which the same
21 counsel have appeared.

22 I will file an opinion very soon, today or
23 tomorrow, in the *Lyons* case where there'll be a more
24 adequate description of my reasoning with respect to the
25 other aspects of the motions before me but very briefly.

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1 On the RICO claims, the general complaint
2 about the use of the RICO statute in this context that
3 suggested earlier has been -- doesn't seek any particular
4 relief. But, in any event, it's really a matter for
5 Congress to address, not me.

6 The challenges based on the claimed failure
7 to allege an adequate enterprise because it doesn't plead an
8 ascertainable structure distinct from that inherent in the
9 alleged pattern completely misses the mark. The enterprise
10 that's alleged here is not an association-in-fact
11 enterprise, but a corporate entity, a legal entity, within
12 the meaning of §1961(4) even though it's alleged to do
13 nothing but illegal business. It's also not one of the RICO
14 defendants which further defeats the claim distinctness
15 problem an enterprise's sole purpose can be fraud contrary
16 to the defendant's argument, see *U.S. versus Turkette*.

17 The pattern challenged to the alleged pattern
18 has no merit. These schemes as alleged, and this is a
19 motion to dismiss, and I have to take the well-pleaded
20 allegations to be true. They are the epitome of
21 closed-ended continuity, excuse me, of open-ended
22 continuity. The sole purpose of these entities is to commit
23 fraud. The threat of continuity in here is in the
24 racketeering activity alleged.

25 The challenges to the specificity of the

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1 fraud alleged, and the sufficiency of the pleadings in this
2 regard, which afflict both the -- not afflict -- they are a
3 part of the challenges both to the RICO count and to the
4 state law fraud counts have no merit. It's a 162-page
5 complaint with a bunch of appendices and exhibits that lay
6 out the claim number and the date submitted, billing codes
7 used, and the like.

8 There is ample, maybe too much specificity of
9 the allegations in this complaint so those challenges have
10 no merit.

11 The statute of limitations argument is
12 frivolous. All the alleged acts being within the
13 limitations period.

14 The argument that with respect to the fraud
15 claim that Allstate is a sophisticated insurer so it can't
16 properly plead reasonable reliance as I suggested during the
17 argument itself I think is not something that can properly
18 be decided at this stage of the game. It's such a -- the
19 reasonableness of the insurers' reliance is intensely fact
20 bound; it can't be decided as a matter of law.

21 The challenge to the unjust enrichment claim
22 fails. Plaintiffs can plead unjust enrichment as an
23 alternative to the contract remedies.

24 The joinder and severance arguments are
25 denied. The defendants and the causes of action were

Oral Argument

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1 properly joined under §20(a)(2) of the Federal Rules of
2 Civil Procedure which allow joinder, "In one action where
3 any right to relief is asserted against the defendants
4 jointly, severally, or in the alternative with respect to or
5 arising out of the same transaction occurrence or series of
6 transactions or occurrences, and any question of law or fact
7 is common to all defendants and will arise in the action."

8 Under *United Mine Workers against Gibbs*, 383,
9 U.S. 715 at 724, it's a 1966 case from the Supreme Court I'm
10 instructed that the impulses toward, "Entertaining the
11 broadest possible scope of action consistent with fairness
12 to the parties. Joinder of claims, parties, and remedies
13 are strongly encouraged."

14 Here, all the moving defendants submit an
15 identical delivery receipts and/or assignment of benefit
16 forms to the plaintiff and contain the same irregularities,
17 obviously, based on a shared template and we use the same
18 phantom billing codes for the same items strongly suggests
19 coordination among the defendants. And because the complex
20 schemes that are alleged are generally identical they're
21 clearly logically related.

22 Severance may be an issue that is going to be
23 properly addressed once again down the road assuming the
24 case survives what remains of the motions. I can see the
25 possible prejudice. I can see possible prejudice to

Oral Argument

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1 configurations of plaintiffs if they're all to be tried
2 together, but at the moment I see nothing but efficiency in
3 keeping them together in the case. So any application at
4 this point to sever -- or the application to sever is
5 denied.

6 I will reserve on the motion to compel. The
7 aspect of the motion to compel that this case shares with
8 the *Lyons* case will be addressed in that Memorandum and
9 Order, and to the extent there is a separate argument here I
10 will deal with it separately.

11 MR. VALERIO: Thank you.

12 MR. STERN: Thank you.

13 MS. DIGLIO: Thank you.

14 MS. BURGOS: Thank you.

15 MR. NATBONY: Thank you.

16 MR. BLODNICK: Thank you.

17 THE COURT: Thank you.

18 (WHEREUPON, this matter was adjourned.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript of the
record of proceedings in the above-entitled matter.



Anthony D. Frisolone, FAPR, RDR, CRR, CRI
Official Court Reporter

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